Supreme Court, U. S.
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In the
Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1695

JAMES D. ECKMAN, *Petitioner,*

v

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals for the Sixth Circuit

on the brief:
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The petitioner James D. Eckman respectfully prays that a writ of certiorari issue to review the judgment and order of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on May 3, 1977.

ORDER BELOW

The order of the Court of Appeals which was not reported is set forth in an appendix hereto. The order and judgment by the United States District Court for the Northern District of Ohio, Eastern Division pertinent to the questions raised herein is included in the transcript of the plea proceeding and is set forth in the appendix hereto.

JURISDICTION

The judgment by the court below was entered on May 3, 1977 and this petition for certiorari will be filed on or prior to June 2, 1977. This Court's jurisdiction is invoked under Title 28 United States Code Section 1254(1).

STATEMENT OF THE ISSUES

1. WHETHER STRICT PROCEDURAL COMPLIANCE IS REQUIRED UNDER THE NEWLY AMENDED RULE 11 FEDERAL RULES OF CRIMINAL PROCEDURE DURING PLEA PROCEEDINGS IN A FEDERAL CRIMINAL CASE AFTER DECEMBER 1, 1975?

2. WHETHER THE ORDER BELOW SO FAR SANCTIONED A DEPARTURE BY THE DISTRICT COURT OF THE MANDATE IN McCARTHY v UNITED STATES 394 U.S. 459 (1969) THE REQUIREMENTS OF WHICH WAS EMPHASIZED BY THE NEW CONGRESSIONAL MANDATE [RULE 11 F.R. Cr. P., DECEMBER 1, 1975]?

STATUTE AND RULE INVOLVED

United States Code, Title 18:
Section 659 [full text set forth in the appendix appended hereto].

Federal Rules of Criminal Procedure, Title 18, Rule 11, amended eff. Dec. 1, 1975 [full text set forth in the appendix appended hereto].

STATEMENT OF THE CASE

Petitioner tendered a plea of guilty on February 17, 1976 in the District Court and he was convicted for having possession of a quantity of cigarettes stolen in interstate. Pursuant with a plea bargain a two year custodial sentence was imposed execution of which was suspended and probation was ordered by the trial judge. After a hearing on June 23, 1976 the trial judge revoked probation on the grounds that petitioner was in the company of felons and that he was outside the jurisdiction of the Northern District of Ohio. On the same date a two year custodial sentence was imposed but stayed pending appeal. A timely notice of appeal was filed.

In the court below petitioner claimed, *inter alia*, that where a plea of guilty is tendered under the protection of Rule 11, Federal Rules of Criminal Procedure, it was a clear abuse of discretion and plain error which affected a substantial fundamental right to impose sentence after a conviction was obtained under the influence of a plea bargain without full compliance with the Rule. He contended that after December 1, 1975, full, strict, procedural compliance is required of the Federal Courts under this Court's mandate in *McCarthy v. United States*, 394 U.S. 459 (1969) and under the new congressional mandate.

The court below, having jurisdiction under Title 28 United States Code Section 1291 held that there was no violation of the provisions of Rule 11, Federal Rules of Criminal Procedure.

The record of the plea proceeding shows that counsel for petitioner and the government entered a plea agreement which was spelled out by counsel for the government, the District Judge and approved by petitioner's lawyer. When the District Judge addressed him personally, petitioner said that he was guilty and understood the agreement; that

there were not other promises; that he was present at the place where a shipment of cigarettes was situated and that he had possession of stolen goods. Upon that inquiry, the District Judge accepted the plea bargain and judged petitioner guilty.

ARGUMENT FOR THE WRIT

1. THE ORDER BELOW RUNS AFOUL OF THE CONGRESSIONAL MANDATE AND THIS COURT'S MANDATE IN McCARTHY v UNITED STATES, 394 U.S. 459, AS TO THE CORRECT APPLICATION OF THE PROVISIONS OF RULE 11, FEDERAL RULES OF CRIMINAL PROCEDURE AFTER DECEMBER 1, 1975.

In 1973 the court below had occasion to comment on the requirements of *McCarthy v. United States, supra. Per curiam,* a unanimous panel reasoned that failure to comply *strictly* with Rule 11, would be *per se* prejudicial after *McCarthy.* [our emphasis] *See* e.g., *Pettigrew v. United States,* 480 F. 2d 681, 683 (6th Cir. 1973). Two years later, a different panel of Judges in the Court below held that there was *substantial* compliance with Rule 11 which was sufficient after *McCarthy, supra;* but Circuit Judge McCree dissented, holding that McCarthy is mandatory, e.g., *United States v. Brogan,* 519 F. 2d 28, 30 (6th Cir. 1975), *cert. denied,* 96 S. Ct. 569.

While the McCarthy decision did not canvass plea bargain situations as such, there is ample authority suggesting that the appearance of a plea bargain on the record does not excuse full compliance with Rule 11. Cf. *Santobello v. New York,* 404 U.S. 257 (1971). *A-priori,* the existence of a plea bargain on the record raises the presumption of a coerced plea rather than an affirmative showing of a

free and voluntary waiver of the fundamental protections normally required in the usual course of federal criminal proceedings.

This record is silent; devoid of any suggestion that there was an intentional relinquishment or abandonment of (1) the privilege to resist self-incrimination, (2) the right to confrontation, (3) the right to advice and assistance of counsel at a trial by jury at every stage of the prosecution, all of which is firmly grounded in the Fifth and Sixth Amendments of the Constitution. See e.g., *McCarthy v. United States, supra,* 394 U.S. at 466; *cf. Boykin v. Alabama,* 395 U.S. 238, 243-44 (1969). Moreover, there is here, an absence of the judicial advice required by Congress under the newly amended Rule 11(c)(d). Presuming waiver of the aforementioned rights, privileges, guarantees and protections from a silent record is impermissible. id, 395 U.S. at 242; *McCarthy v. United States,* 394 U.S. at 466. A-14, 15.

Finally, and most significantly, it is clear that to prove the commission of an offense under the statutory scheme herein, [18 U.S.C. Sec. 659] the government must show that the stolen cigarettes were actually a part of an interstate shipment and that petitioner had knowledge thereof. Petitioner's plaintive response to the District Judge's inquiry, that he was present at the scene and that he possessed stolen property does not fill the gap in the record under this statute. App. Tr. p. 9; *United States v. Untiedt,* 479 F. 2d 1265 (8th Cir. 1973); *United States v. Hilyer,* 543 F. 2d 41 (8th Cir. 1976). *See: A-1* [*our emphasis*]

There was error, plain on the face of the record when the District Judge accepted petitioner's plea without an affirmative showing ON THE RECORD that there was an understanding of the nature of the charge and offense, an intentional relinquishment of known rights, privileges and protections with full knowledge of the con-

sequences of the plea of guilty. When the court below held otherwise, it so far departed from its decisions, the mandate of this Court in McCarthy, supra, and the new congressional mandate effective on December 1, 1975 as to call for an exercise of this Court's supervisory power in the circumstances of this case.

2. THE ORDER BELOW CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEAL AS TO THE PROPER ADMINISTRATION OF RULE 11 FEDERAL RULES OF CRIMINAL PROCEDURE AFTER DECEMBER 1, 1975.

Upon the scant inquiry conducted by the District Judge, he was "satisfied . . . that there is a factual basis for the plea[s] of guilty [which are] voluntarily entered. . . ." A-16. We contend that the order below stands for mere stated compliance by the District Judge which presumes to fill the gap in the record. Such a rule stands in conflict with the strict or substantial compliance rules noted in *Pettigrew v. United States*, 480 F.2d at 683 and *United States v. Brogan*, 519 F. 2d at 30, decisions rendered in the court below prior to the order and judgment rendered in this case.

In *United States v. Journet*, 544 F. 2d 633 (2d Cir. Nov. 1, 1976) the court held that unless the defendant is *specifically* informed of each and every element enumerated in Rule 11 [eff. Dec. 1, 1975] the plea *must* be vacated. [emphasis ours], *id*, 544 F. 2d at 634. Circuit Judge Mansfield reasoned for a unanimous panel that the guilty plea amounts to a conviction which may have most serious consequences—as in this case imprisonment—and a hasty or cavalier acceptance is rejected because, *inter alia*, fundamental constitutional rights are at stake, the loss of which could hardly be classified as insubstantial or harmless, *id*, at p. 636. And, in *United States v. Boone*, 543 F. 2d 1090

(4th Cir. Nov. 8, 1976), Circuit Judge Craven held that with respect to the 1975 Rule amendment, prejudice inheres in a failure to comply with Rule 11, because it deprives the defendant of the Rule's procedural safeguards that are designed to facilitate a more accurate determination of the voluntariness of his plea. *id*, at p. 1092. However, we are constrained to point out that the ON THE RECORD inquiry under the Journet-Boone cases might have passed Rule 11 muster prior to December 1, 1975.

> Although the ultimate question is always one of the voluntariness, we think the thrust of McCarthy has continuing vitality and we should not anticipate its erosion, or undertake to separate inquiries that may be thought more essential from others contained in the command of the rule. *id*, [543 F. 2d at 1092].

These conflicts justify the grant of certiorari to review the judgment rendered in the court below.

3. THE ORDER BELOW RAISES SIGNIFICANT AND RECURRING PROBLEMS CONCERNING APPLICATION OF THE NEWLY AMENDED RULE 11, FEDERAL RULES OF CRIMINAL PROCEDURE.

The case of *United States v. Olive, sub nom*, Eckman, is presently pending in the same District Court on a motion to withdraw plea under Rule 32(d), Federal Rules of Criminal Procedure. See, A-10; A-15, 16. The hearing on the motion was postponed at the government's request to await the order or decision in the instant case from the court below. Will the law [sic] of Eckman apply in the District Court again? Questions concerning the application of the newly amended Rule are presently appearing in this Court. United States v. Lambros, 544 F. 2d 962, No. 76-827 [not yet reported] *cert. denied*, March 21, 1977; Parrish v. United States, No. 76-1073 and Pihakis v. United States, No. 76-1439.

These considerations seem to add further justification for a grant of certiorari to review the order and judgment below.

CONCLUSION

We respectfully conclude that for the reasons posited herein a writ of certiorari ought to issue to review the judgment and order of the Sixth Circuit in United States v. Eckman, No. 76-2314 (May 3, 1977); No. Cr. 75-56 (Dist. Ct. ND ED Ohio, June 23, 1976.

Respectfully submitted,

CARMEN A. POLICY
424 City Centre One
P.O. Box 837
Youngstown, Ohio

on the brief:
R. John Mock
Youngstown, Ohio

CERTIFICATE OF SERVICE

On the date of filing two copies of the Petition and Appendix was mailed postage pre-paid to: Honorable Wade McCree, Solicitor General, United States of America, c/o Department of Justice, Washington, D. C.

CARMEN A. POLICY
Attorney for Petitioner

APPENDICES

APPENDIX A

United States Code Title 18, Section 659:

Whoever embezzles, steals, or *unlawfully takes*, carries away, or conceals, or by fraud or deception obtains *from any* pipeline system, railroad car, wagon, *motortruck, or other vehicle*, or from any tank or storage facility, station, station house, platform or depot or from any steamboat, vessel, or wharf, or from any aircraft, air terminal, airport, aircraft terminal or air navigation facility *with intent to convert to his own use any goods or chattels moving as or which are a part of or which constitute an interstate or foreign shipment of freight, express, or other property; or*

Whoever buys or receives or has in his possession any such goods or chattels, knowing the same to have been embezzled or stolen; or

Whoever embezzles, steals or unlawfully takes, carries away, or by fraud or deception obtains with intent to convert to his own use any baggage which shall have come into the possession of any common carrier for transportation in interstate or foreign commerce or breaks into, steals, takes, carries away, or conceals any of the contents of such baggage, or buys, receives, or has in his possession any such baggage or any article therefrom of whatever nature, knowing the same to have been embezzled or stolen; or

Whoever embezzles, steals, or unlawfully takes by any fraudulent device, scheme, or game, from any railroad car, motor vehicle, steamboat, vessel, or aircraft operated by any common carrier moving in interstate or foreign commerce or from any passenger thereon any money, baggage, goods, or chattels, or whoever buys, receives, or has in his possession any such money, baggage, goods or chattels, knowing the same to have been embezzled or stolen–

Shall in each case be fined not more than $5,000 or imprisoned not more than ten years, or both; but if the amount or value of such money, baggage, goods or chattels does not exceed $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.

The offense shall be deemed to have been committed not only in the district where the violation first occurred, but also in any district in which the defendant may have taken or been in possession of the said money, baggage, goods, or chattels.

The carrying or transporting of any such money, freight, express, baggage, goods, or chattels in interstate or foreign commerce, knowing the same to have been stolen, shall constitute a separate offense and subject the offender to the penalties under this section for unlawful taking, and the offense shall be deemed to have been committed in any district into which such money, freight, express, baggage, goods, or chattels shall have been removed or into which the same shall have been brought by such offender.

To establish the interstate or foreign commerce character of any shipment in any prosecution under this section the waybill or other shipping document of such shipment shall be prima facie evidence of the place from which and to which such shipment was made. The removal of property from a pipeline system which extends interstate shall be prima facie evidence of the interstate character of the shipment of the property.

A judgment of conviction or acquittal on the merits under the laws of any State shall be a bar to any prosecution under this section for the same act or acts. Nothing contained in this section shall be construed as indicating an intent on the part of Congress to occupy the field in which provisions of this section operate to the exclusion of State laws on the same subject matter, nor shall any provision of his section be construed as invalidating

any provision of State law unless such provision is inconsistent with any of the purposes of this section or any provision thereof.

As amended May 24, 1949, c. 139, § 13, 63 Stat. 91; Oct. 14, 1966, Pub.L. 89-654, § 1(a)-(d), 80 Stat. 904.

APPENDIX B

Federal Rules of Criminal Procedure:

Rule 11. Pleas

(a) ALTERNATIVES. A defendant may plead not guilty, guilty, or nolo contendere. If a defendant refuses to plead or if a defendant corporation fails to appear, the court shall enter a plea of not guilty.

(b) NOLO CONTENDERE. A defendant may plead nolo contendere only with the consent of the court. Such a plea shall be accepted by the court only after due consideration of the views of the parties and the interest of the public in the effective administration of justice.

(c) ADVICE TO DEFENDANT. Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and inform him of, and determine that he understands, the following:

(1) the nature of the charge to which the plea is offered, the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law; and

(2) if the defendant is not represented by an attorney, that he has the right to be represented by an attorney at every stage of the proceeding against him and, if necessary, one will be appointed to represent him; and

(3) that he has the right to plead not guilty or to persist in that plea if it has already been made,

and that he has the right to be tried by a jury and at that trial has the right to he assistance of counsel, the right to confront and cross-examine witnesses against him, and the right not to be compelled to incriminate himself; and

(4) that if he pleads guilty or nolo contendere there will not be a further trial of any kind, so that by pleading guilty or nolo contendere he waives the right to a trial; and

(5) that if he pleads guilty or nolo contendere, the court may ask him questions about the offense to which he has pleaded, and if he answers these questions under oath, on the record, and in the presence of counsel, his answers may later be used against him in a prosecution for perjury or false statement.

(d) INSURING THAT THE PLEA IS VOLUNTARY. The court shall not accept a plea of guilty or nolo contendere without first, by addressing the defendant personally in open court, determining that the plea is voluntary and not the result of force or threats or of promises apart from a plea agreement. The court shall also inquire as to whether the defendant's willingness to plead guilty or nolo contendere results from prior discussions between the attorney for the government and the defendant or his attorney.

(e) PLEA AGREEMENT PROCEDURE.

(1) *In General.* The attorney for the government and the attorney for the defendant or the defendant when acting pro se may engage in discussions with a view toward reaching an agreement that, upon the entering of a plea of guilty or nolo contendere to a charged offense or to a lesser or related offense, the attorney for the government will do any of the following:

(A) move for dismissal of other charges; or

(B) make a recommendation, or agree not to oppose the defendant's request, for a particular sentence, with the understanding that such recommendation or request shall not be binding upon the court; or

(C) agree that a specific sentence is the appropriate disposition of the case.

The court shall not participate in any such discussions.

(2) *Notice of Such Agreement.* If a plea agreement has been reached by the parties, the court shall, on the record, require the disclosure of the agreement in open court or, on a showing of good cause, in camera, at the time the plea is offered. Thereupon the court may accept or reject the agreement, or may defer its decision as to the acceptance or rejection until there has been an opportunity to consider the presentence report.

(3) *Acceptance of a Plea Agreement.* If the court accepts the plea agreement, the court shall inform the defendant that it will embody in the judgment and sentence the disposition provided for in the plea agreement.

(4) *Rejection of a Plea Agreement.* If the court rejects the plea agreement, the court shall, on the record, inform the parties of this fact, advise the defendant personally in open court or, on a showing of good cause, in camera, that the court is not bound by the plea agreement, afford the defendant the opportunity to then withdraw his plea, and advise the defendant that if he persists in his guilty plea or plea of nolo contendere the disposition of the case may be less favorable to the defendant than that contemplated by the plea agreement.

(5) *Time of Plea Agreement Procedure.* Except for good cause shown, notification to the court of the existence of a plea agreement shall be given at the arraignment or at such other time, prior to trial, as may be fixed by the court.

(6) *Inadmissibility of Pleas, Offers of Pleas, and Related Statements.* Except as otherwise provided in this paragraph, evidence of a plea of guilty, later withdrawn, or a plea of nolo contendere, or of an offer to plead guilty or nolo contendere to the crime charged or any other crime, or of statements made in connection with and relevant to, any of the foregoing pleas or offers, is not admissible in any civil or criminal proceeding against the person who made the plea or offer. However, evidence of a statement made in connection with, and relevant to, a plea of guilty, later withdrawn, a plea of nolo contendere, or an offer to plead guilty or nolo contendere to the crime charged or any other crime, is admissible in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record, and in the presence of counsel.

(f) DETERMINING ACCURACY OF PLEA. Notwithstanding the acceptance of a plea of guilty, the court *should* not enter a judgment upon such plea without making such inquiry as shall satisfy it that there is a factual basis for the plea.

(g) RECORD OF PROCEEDINGS. A verbatim record of the proceedings at which the defendant enters a plea shall be made and, if there is a plea of guilty or nolo contendere, the record shall include, without limitation, the court's advice to the defendant, the inquiry into the voluntariness of the plea including any plea agreement, and the inquiry into the accuracy of a guilty plea.

Comment and History of Rule

Rule 11 stood as originally promulgated until 1966, when it was amended to require the court to satisfy itself that a defendant who pleads guilty or *nolo contendere* does so voluntarily and with an understanding of the consequences of the plea. The amendment also required the court to conduct such examinations and inquiries as necessary to be satisfied that a factual basis existed for a plea of guilty.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee

v.

JAMES D. ECKMAN,
Defendant-Appellant

No. 76-2314
Order

Before: PHILLIPS, Chief Judge; ENGEL, Circuit Judge and RUBIN, District Judge*

James D. Eckman pleaded guilty in the district court of a violation of 18 U.S.C. § 659 which charged him with the theft of 730 cases of cigarettes from interstate commerce. The plea followed a negotiated agreement whereby the defendant was given a two-year suspended sentence and five years probation. The government agreed that if the defendant was not involved in any criminal activity for two years, the five year probationary period might be reduced to two years without any opposition to the termination by the government. Before the two-year period had been completed, however, Eckman was found guilty of violation of other terms of his probation. The sentencing judge revoked his probation and imposed the two-year sentence.

In his appeal from the order terminating his probation Eckman charges that his commitment for reasons other than the violation of the prohibition against criminal activity represents a breach of the bargain which he struck with the government at the time of his plea. He, therefore, seeks to have the sentence set aside and the cause

*The Honorable Carl B. Rubin, Judge, United States District Court for the Southern District of Ohio, sitting by designation.

remanded for either enforcement of the alleged agreement or vacation of the plea and trial of the charges against him.

Upon review, the court finds these contentions are without merit. There is no showing that the government violated its agreement or that the sentencing court did not respect its terms. The court further finds that there was no violation of the provisions of Rule 11, Federal Rules of Criminal Procedure. Accordingly,

IT IS ORDERED that the judgment of the district court is affirmed.

ENTERED BY ORDER OF THE COURT

JOHN P. HEHMAN
Clerk

Appendix D

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO EASTERN DIVISION

UNITED STATES OF AMERICA,
Plaintiff,

vs.

RICHARD O. DUSTMAN,
JAMES DONALD ECKMAN, and
WILLIAM GEORGE OLIVE,
Defendants.

Criminal Action No. CR 75-56-Y

Proceedings before HONORABLE THOMAS D. LAMBROS at 12:00 o'clock P.M., Tuesday, February 17, 1976.

APPEARANCES:

On behalf of the Government:
Mr. William J. Edwards,
Assistant United States Attorney.

On behalf of Defendant Richard O. Dustman:
Mr. David R. White and
Mr. Joseph Saker.

On behalf of Defendant James Donald Eckman:
Mr. R. John Mock and
Mr. Carmen Policy.

On behalf of Defendant William George Olive:
Mr. Gary VanBrocklin.

TUESDAY, FEBRUARY 17, 1976, 12:00 P.M.

THE COURT: This morning we have on for consideration, on the criminal docket, the case of the United States of America vs. Richard O. Dustman, James Donald Eckman, and William George Olive, being Criminal Docket No. 75-56-Y.

Each of the defendants is charged in a one-count indictment charging violations of Title 18, Section 659 and Section 2 of the United States Code. Each of them is charged with having, on or about the 22nd day of July, 1975, knowingly had in their possession chattels of a value in excess of $100, namely, numerous cases of cigarettes, which had been stolen while moving and constituting a part of an interstate shipment from Richmond, Virginia to Columbus, Ohio. It is further charged in the indictment that each of the defendants had knowledge that the chattels involved had been stolen.

This crime is punishable in the event of conviction by a maximum fine of $5,000 and ten years' imprisonment, or both.

This case is scheduled for trial by jury today. The jury has been summoned. The jury is in the jury assembly room ready to be called for the purposes of being impaneled.

Last week an evidentiary hearing was held in these cases. The Court considered the defendants' several motions to suppress evidence and statements and searches.

Upon conclusion of the evidentiary hearing, the Court overruled and denied each of the motions to suppress.

I am now advised by counsel that a change of plea is indicated with respect to each of the defendants.

The record shall reflect that Richard O. Dustman is present in open court together with his lawyers, Mr. David White and Mr. Joseph Saker.

Defendant James Donald Eckman is present in open court together with his lawyers, Mr. John Mock and Mr. Carmen Policy.

Mr. William George Olive is present in open court together with his lawyer, Mr. Gary VanBrocklin.

Mr. William J. Edwards, Assistant United States Attorney, is present for the United States.

Gentlemen, would you present to the Court at this time the position of the respective defendants with respect to possible change of plea.

MR. MOCK: Yes, your Honor.

At this time, in behalf of Mr. Eckman, we would at this time withdraw our former plea of not guilty and enter a plea of guilty as charged in the indictment.

THE COURT: All right.

What is the position with respect to Richard O. Dustman?

MR. WHITE: Your Honor, at this time we will withdraw our plea of not guilty and enter a plea of guilty as charged.

THE COURT: And with respect to William George Olive?

MR. VanBROCKLIN: On behalf of the defendant William George Olive, we will withdraw our former plea of not guilty and enter a plea of guilty as charged in the indictment, your Honor.

THE COURT: Thank you.

Each of the defendants, through counsel at this time, having withdrawn his former plea of not guilty to the charge contained in the indictment, and each defendant having now entered a plea of guilty, before the Court makes further inquiry pursuant to Rule 11, Mr. Edwards,

do you wish to make a statement on behalf of the Government?

MR. EDWARDS: Yes, your Honor.

It has been agreed between Mr. Mock and myself, Mr. Mock being the attorney for Mr. Eckman, that if Mr. Eckman would enter a plea of guilty to the indictment in this case, that the following sentence would be imposed. Mr. Eckman would be sentenced to a period of two years in the custody of the Attorney General. This sentence would thereafter be suspended and Mr. Eckman would be placed on probation for a period of five years.

If, at the end of two years of this probation, Mr. Eckman has not involved himself in any other criminal activity, the Government would not object to a motion by Mr. Eckman to have his probation terminated at that time.

With respect to both Mr. Dustman and Mr. Olive, the Government would not object to any term of probation that the Court would see fit to propose.

THE COURT: Mr. Mock, do you wish to react to the statement of Mr. Edwards?

MR. MOCK: That is a correct statement, your Honor.

THE COURT: Mr. White, in behalf of Mr. Dustman?

MR. WHITE: That is a correct statement as to Mr. Dustman, your Honor.

THE COURT: Mr. VanBrocklin?

MR. VanBROCKLIN: That is a correct statement as to Mr. Olive, your Honor.

THE COURT: At this time, I will address Mr. Dustman.

What is your plea to the indictment?

DEFENDANT DUSTMAN: Guilty, sir.

THE COURT: It is my understanding from the statement of counsel that it has been agreed by and between the Government and yourself that the Government, in consideration of your plea of guilty, would not oppose a sentence consisting of a period of probation, the imposition of any confinement in prison being suspended and being placed on probation.

Is that your understanding?

DEFENDANT DUSTMAN: Yes, sir.

THE COURT: Have any other promises been made to you other than that?

DEFENDANT DUSTMAN: No, sir.

MR. WHITE: Your Honor?

THE COURT: I'm sorry.

MR. WHITE: Excuse me.

May I make this statement as to Mr. Dustman?

THE COURT: Yes.

MR. WHITE: I believe during the hearing on the motion to suppress that the prosecutor and I were both in error as to the prior record of Mr. Dustman.

Has the Court been made aware of this?

THE COURT: Yes. It has been called to my attention that the record reflects a misdemeanor conviction rather than a felony conviction.

MR. WHITE: That is correct, your Honor.

THE COURT: All right.

Then I further ask you, Mr. Dustman: Did you, on or about the 22nd day of July, 1975 have knowledge that the semi tractor-trailer unit in which you were participating in the painting and making certain alterations thereon did contain a shipment of stolen goods?

DEFENDANT DUSTMAN: Yes, sir.

THE COURT: Thank you.
Mr. Eckman, what is your plea to the indictment?

DEFENDANT ECKMAN: Guilty.

THE COURT: It has been represented in open court by counsel for the Government and your lawyer that an agreement has been reached between yourself and the Government that you will enter a plea of guilty in consideration of the imposition of a sentence of two years' custody of the Attorney General, the execution of which sentence is to be suspended and that you will be placed on probation for a period of five years, and that after the expiration of two years of the probation, if you have not involved yourself in any criminal activity, that the Government would not at that time oppose a motion on your behalf to have your probation terminated at that time.

DEFENDANT ECKMAN: Yes, sir. I understand.

THE COURT: Is that your understanding?

DEFENDANT ECKMAN: Yes, sir.

THE COURT: Do you have any questions about that agreement?

DEFENDANT ECKMAN: No, sir.

THE COURT: Have any other promises been made to you in consideration of your plea of guilty other than that?

DEFENDANT ECKMAN: No, sir.

THE COURT: On the 22nd day of July, 1975, were you present at the premises in — was that New Springfield?

MR. EDWARDS: New Springfield, Ohio, your Honor.

THE COURT: — New Springfield, Ohio where a Snyder trailer unit containing a shipment of cigarettes was situated, and did you know at that time that that vehicle contained stolen goods?

DEFENDANT ECKMAN: Yes, sir.

THE COURT: And did you at that time knowingly have possession of those stolen goods?

DEFENDANT ECKMAN: Yes, sir.

THE COURT: All right. Thank you.
Mr. Olive, what is your plea to the charge in the indictment?

DEFENDANT OLIVE: Guilty.

THE COURT: Do you understand that the agreement that has been reported to me is that in consideration of your plea of guilty, that the Government would not oppose a suspension of the imposition of sentence and placing you on probation for a period of two years?

DEFENDANT OLIVE: Yes.

THE COURT: Do you enter a plea of guilty on that condition?

DEFENDANT OLIVE: Yes, sir.

THE COURT: Do you have any questions about that agreement?

DEFENDANT OLIVE: No, sir.

THE COURT: Were you at the premises in New Springfield, Ohio where the Snyder trailer unit containing a shipment of stolen cigarettes was situated on July 22, 1975?

DEFENDANT OLIVE: Yes, sir.

THE COURT: Did you know that the contents of that trailer unit were stolen?

DEFENDANT OLIVE: Yes.

THE COURT: Did you participate in the possession of those stolen goods at that time?

DEFENDANT OLIVE: Yes.

THE COURT: All right. Thank you.

I am satisfied, based on the inquiry conducted by the Court and based on the statements of counsel for the Government and counsel for the defendants, and each defendant now having personally and through counsel entered a plea of guilty to the charge contained in the indictment, and an agreement having been announced in open court, and the Court having inquired of respective counsel and the parties concerning the agreement, which agreement as to plea and sentencing has been spread on the record of this case in open court, and all the facts and circumstances having been brought to my attention with respect to the background of this offense and the agreements entered into by and between the parties, and the Court will accept the agreement of the parties finding that there is a factual basis for the pleas of guilty and finding that the pleas of guilty are voluntarily entered and that no promises other than those which appear of record have been made. The Court will at this time accept the pleas of guilty of the respective defendants, adjudge each defendant, Richard O. Dustman, James Donald Eckman, and William George Olive, guilty as charged in the indictment.

Having adjudged each defendant guilty on their pleas of guilty, and the Court now being ready to pronounce judgment, do you, Mr. Dustman, do you, Mr. Eckman, or do you, Mr. Olive, have any statements that you wish to make to the Court before sentencing?

DEFENDANT DUSTMAN: No, your Honor.

DEFENDANT OLIVE: No.

DEFENDANT ECKMAN: No, your Honor.

THE COURT: Do counsel have any statements they wish to make?

MR. MOCK: No, your Honor.

Mr. VanBROCKLIN: No, your Honor.

THE COURT: The Court will at this time pronounce judgment.

In accordance with the agreement entered into by and between the parties, Richard O. Dustman, it is the judgment of this Court that imposition of sentence be and is hereby suspended, and you are placed on probation for a period of two years.

William George Olive, it is the judgment of this Court that imposition of sentence be and is hereby suspended, and you are placed on probation for a period of two years.

James Donald Eckman, it is the judgment of this Court that you be committed to the custody of the Attorney General of the United States for a period of two years. The execution of that sentence shall be suspended and you shall be placed on probation for a period of five years with the understanding that if, after the expiration of two years of that probation period, you have not involved yourself in any criminal activity, that the Government will not oppose a motion on your behalf to have your probation period terminated.

Be mindful, however, gentlemen, that with respect to those individuals who received a two-year probationary period, if for any reason the Probation Department is of the view that a longer period of probation is required prior to the expiration of the two-year period, the Probation Department may apply to this Court for an enlargement of that period of time.

That, of course, is not usually the case unless a defendant has presented some problems which indicate some obstacle to a completion of a period of rehabilitation within that period of time.

The judgment of this Court has been pronounced. These cases are now concluded.

I want the respective defendants to fully understand that if they involve themselves in any future criminal activity or conduct themselves in a manner which is in violation of the terms and conditions of probation, that your period of probation can be revoked and sentence imposed.

I trust that each defendant will conduct himself accordingly and comply with the requirements of the Probabation Department and the conditions of probation.

If anyone has any questions at this time concerning this sentence, I will be happy to answer them.

MR. MOCK: No questions.

MR. VanBROCKLIN: No questions.

THE COURT: Thank you, gentlemen.

CERTIFICATE

I, Dennis A. Parise, Official Court Reporter in and for the District Court of the United States for the Northern District of Ohio, Eastern Division, do hereby certify that the above and foregoing is a true and correct transcript of the proceedings herein.

DENNIS A. PARISE

Official Court Reporter

Supreme Court, U. S.
FILED
JUL 18 1977
MICHAEL RODAK, JR., CLERK

No. 76-1695

In the Supreme Court of the United States

OCTOBER TERM, 1977

JAMES D. ECKMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

DANIEL M. FRIEDMAN,
Acting Solicitor General,

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Assistant Attorney General,

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The order of affirmance of the court of appeals (Pet. App. C) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on May 3, 1977. The petition for a writ of certiorari was filed on May 31, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, on appeal from an order revoking probation, petitioner was entitled to have his conviction set aside because the district court failed to comply completely with Rule 11 of the Federal Rules of Criminal Procedure in accepting his guilty plea.

STATEMENT

1. An indictment filed on October 16, 1975, in the United States District Court for the Northern District of Ohio charged petitioner and two co-defendants, Richard Dustman and William Olive, with knowing possession of 730 cases of cigarettes that had been stolen while moving in interstate commerce, in violation of 18 U.S.C. 659 and 2. On February 17, 1976, the date on which trial was scheduled to begin, petitioner and his co-defendants appeared before the court with retained counsel for the purpose of withdrawing their previously entered pleas of not guilty and substituting guilty pleas.

At the outset of the hearing, the district court informed each defendant that he had been charged with knowing possession of numerous cases of cigarettes that had been stolen while part of an interstate shipment from Richmond, Virginia, to Columbus, Ohio, and that the maximum penalty upon conviction for that offense was a $5,000 fine and ten years' imprisonment. The court also noted that it had denied defendants' suppression motions the week before and that it was prepared to start their trial by selecting a jury, but that it had just been advised that each of the defendants desired to change his plea to guilty (Pet. App. A-10 to A-11).

After defense counsel had confirmed the court's understanding, the Assistant United States Attorney revealed the existence of a bargain with petitioner whereby, in exchange for his plea of guilty, the court would impose a sentence of two years' imprisonment, suspend the sentence, and place petitioner on probation for five years. In addition, the prosecutor stated that the plea agreement provided that if petitioner did not involve himself in any criminal activity for two years, the government would not oppose a motion to terminate the probationary period

at that time. Petitioner's attorney verified the accuracy of the prosecutor's account of the plea bargain (Pet. App. A-12).

Following an inquiry of co-defendant Dustman regarding the voluntariness of his plea, the court asked petitioner whether he understood the terms of the plea bargain and whether any other promises had been made in exchange for the plea. Petitioner replied that he was aware of the plea bargain, that he had no questions about it, and that his plea was not being offered for any other consideration (Pet. App. A-14). Petitioner also admitted that on July 22, 1975, the date alleged in the indictment, he had knowingly been in possession of a trailer unit containing a stolen shipment of cigarettes (*id.* at A-14 to A-15). After a similar interrogation of co-defendant Olive, the court expressed its satisfaction that the pleas had been entered voluntarily and were supported by an adequate factual basis (*id.* at A-16). It then imposed probationary sentences on petitioner and his co-defendants in accordance with the terms of the plea bargain, but cautioned that probation could be revoked if the men became involved in criminal conduct "or conduct[ed] themselves in a manner which is in violation of the terms and conditions of probation * * *" (*id.* at A-18).

2. Three months later, on May 19, 1976, petitioner's probation officer moved to revoke his probation on the ground that petitioner had associated with convicted felons, contrary to the conditions of the probation order. After an evidentiary hearing held on June 21, 1976, the district court revoked petitioner's probation and ordered him to serve a term of two years' imprisonment. Petitioner appealed, contending for the first time that the inquiry that had been conducted by the trial judge before accepting his guilty plea had been inadequate under Rule 11 of the

Federal Rules of Criminal Procedure. The court of appeals affirmed (Pet. App. A-7 to A-8).

ARGUMENT

Petitioner contends that his conviction must be vacated because the district court, in accepting his guilty plea, failed to establish a sufficient factual basis for the plea or to advise petitioner that the plea would waive his privilege against self-incrimination and his right to a trial by jury at which he could be represented by counsel and could confront the witnessess against him. These claims are insubstantial.

Rule 11(f), Fed. R. Crim. P., provides that the district court shall not accept a guilty plea "without making such inquiry as shall satisfy it that there is a factual basis for the plea." All this rule requires is that the court undertake an inquiry "factually precise enough and sufficiently specific to develop that [the defendant's] conduct on the occasions involved was within the ambit of that defined as criminal." *Jimenez* v. *United States*, 487 F. 2d 212, 213 (C.A. 5), certiorari denied, 416 U.S. 916. See also *United States* v. *Davis*, 516 F. 2d 574, 577-578 (C.A. 7). Here, the trial judge read petitioner the charge in the indictment, asked whether petitioner believed that he was guilty of the offense, and ascertained that petitioner had been in possession of the stolen shipment and that he had been aware that the cartons of cigarettes were stolen (Pet. App. A-10, A-14 to A-15). This constituted adequate compliance with Rule 11(f). See, *e.g.*, *Bachner* v. *United States*, 517 F. 2d 589, 593 (C.A. 7); *Rosas* v. *United States*, 505 F. 2d 115, 116 (C.A. 5), certiorari denied, 421 U.S. 1001; *Meyer* v. *United States*, 424 F. 2d 1181, 1189 (C.A. 8), certiorari denied, 400 U.S. 853.

Nor is there merit to petitioner's contention that his guilty plea must be overturned because the district court

failed explicitly to mention that the plea waived several rights that would be accorded a defendant at trial. Although the court's inquiry did not recite all of the rights enumerated in Rule 11(c)(3), Fed. R. Crim. P., it is clear that, on the record of this case, that procedural defect does not entitle petitioner to collateral relief from his conviction.[1] As the Court recently noted in *Davis* v. *United States*, 417 U.S. 333, 346, quoting from *Hill* v. *United States*, 368 U.S. 424, 428-429, " 'collateral relief is not available when all that is shown is a failure to comply with the formal requirements' of a rule of criminal procedure in the absence of any indication that the defendant was prejudiced by the asserted technical error." Absent a mistake of constitutional or jurisdictional dimensions, "the appropriate inquiry [is] whether the claimed error of law was 'a fundamental defect which inherently results in a complete miscarriage of justice' * * *" (*ibid.*). See also *Stone* v. *Powell*, 428 U.S. 465, 477, n. 10.

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[1]Petitioner neither appealed his conviction nor filed a timely motion to withdraw his guilty plea under Fed. R. Crim. P. 32(d) on the ground that his Rule 11 proceeding had been defective. This claim was not raised until petitioner's appeal from the order revoking his probation, which was filed more than three months after sentencing and thus well after the time in which to take a direct appeal had expired. See Rule 4(b), Fed. R. App. P. Petitioner's request for relief from his conviction therefore should properly be regarded as a collateral attack on the plea. See *Andrews* v. *United States*, 373 U.S. 334, 338; *Hill* v. *United States*, 368 U.S. 424, 430. Hence, there is no conflict between the decision below and *United States* v. *Journet*, 544 F. 2d 633 (C.A. 2), or *United States* v. *Boone*, 543 F. 2d 1090 (C.A. 4), both of which involved a direct appeal of the defendant's conviction.

Even assuming that this appeal is considered to be a direct attack, we disagree with petitioner that the "automatic reversal" rule of *McCarthy* v. *United States*, 394 U.S. 459, which was crafted to ensure compliance with the 1966 version of Rule 11, should be applied to violations of the amended Rule 11, effective December 1, 1975. We have discussed this question in our brief in opposition to the petition for a writ of certiorari in *Scharf* v. *United States*, No. 76-1611, a copy of which we are sending to petitioner.

Petitioner's claims fail to meet this standard, since he alleges not that he was unaware of his right to a jury trial, to confront the witnesses against him, or to refuse to incriminate himself, but only that the district court's inquiry omitted a recitation of those rights. Indeed, any contention by petitioner that he was in fact ignorant of his right to proceed to trial would be particularly unpersuasive on this record: petitioner was represented by retained counsel, the adequacy of whose services is not questioned, and he was present in the courtroom when the judge annnounced that his trial was about to begin and a jury about to be chosen, but that those proceedings would not be necessary in light of the defendants' proposed change of pleas. See *United States* v. *Saft*, C.A. 2, No. 77-1143, decided July 5, 1977, slip op. 4611-4612.

Boykin v. *Alabama*, 395 U.S. 238, is not to the contrary. In that case, the defendant had been convicted following a guilty plea proceeding in which, "[s]o far as the record shows, the judge asked no questions of [the defendant] concerning his plea, and [the defendant] did not address the court." *Id.* at 239. In those circumstances, the Court concluded that "[i]t was error, plain on the face of the record, for the trial judge to accept petitioner's guilty plea without an affirmative showing that it was intelligent and voluntary." *Id.* at 242. Here, by contrast, the record clearly indicates that petitioner's plea, entered with the assistance of counsel, was knowing and intelligent and had been offered in return for the suspended sentence that petitioner eventually received.

Although the Court in *Boykin* listed several constitutional rights that are waived by pleading guilty and that the district court in this case failed to mention, these rights were enumerated merely to emphasize the gravity of the trial judge's responsibility, because a defendant who pleads guilty simultaneously waives these rights as well as

several others. *Boykin* does not suggest that a plea entered in the absence of a complete recitation of these rights is *ipso facto* constitutionally defective. See *Fontaine* v. *United States*, 526 F. 2d 514, 516 (C.A. 6), certiorari denied, 424 U.S. 973; *Todd* v. *Lockhart*, 490 F. 2d 626, 628, n. 1 (C.A. 8); *United States* v. *Sherman*, 474 F. 2d 303, 305 (C.A. 9).[2]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 1977.

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[2]As the Court stated in *Brady* v. *United States*, 397 U.S. 742, 747-748, n. 4: "The new element added in *Boykin* was the requirement that the record must affirmatively disclose that a defendant who pleaded guilty entered his plea understandingly and voluntarily," not that the trial judge list every conceivable right waived by a plea of guilty.

*The Solicitor General is disqualified in this case.

DOJ-1977-07

Supreme Court, U. S.
FILED
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MICHAEL RODAK

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1695

JAMES D. ECKMAN, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITIONER'S REPLY TO OPPOSITION

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We respectfully request that this Reply be distributed because of the (1) nature of the Opposition Brief and (2) decisions and petitions recorded after we filed our petition in this case. Rule 24 (4) (5).

The Government raised the question of whether we established a peg for review in the court below. They seek to put us to the "hard test" in the collateral precincts as they argue in opposition in Scharf v. United States, No. 76-1611, [Gov. Brief p. 5, n. 1]. In doing so, they overlook a recorded judgment in this criminal case, which is absolutely devoid of the safeguards established by Congress and this Court.

In the court below, we claimed that:

> Where there was a plea bargain in a federal criminal case setting forth conditional probation in lieu of execution of two years imprisonment, the defendant is entitled to specific performance of that agreement. If that agreement is uncertain, ambiguous or not clearly understandable, the plea bargain is untenable and a court on review ought to examine the whole record and determine whether the entire agreement should be set aside. If upon such an examination the reviewing court finds that the sentence and conviction cannot stand muster under Rule 11, Fed. Rules of Crim. Proc., the sentence imposed at a probation revocation proceeding was entered without jurisdiction and it must be vacated, the case remanded and instructions issued requiring further proceedings in the trial court.

The trial court record of the probation revocation proceeding will show that Eckman's lawyer argued that the Government did not show that there was any criminal activity which would trigger the trial court's power to revoke probation.

And we argued that the misunderstanding by Eckman was manifest upon review of the whole record. But the court held otherwise, saying there was not abuse of discretion and further held:

> "that there was no violation of the provisions of Rule 11, Federal Rules of Criminal Procedure." (our emphasis) Pet. App. A-8.

In any event, whether direct or collateral, it is far more appropriate, whenever possible to correct errors reachable by the appeal rather than remit petitioner to a new collateral proceeding. Cf. Barton v. United States, 375 U.S. 52, 54 (1963); United States v. Rosenbarger, 536 F. 2d 717, 722 (6th Cir. 1976).

Under the substantial compliance test advocated in United States v. Brogan, 519 F. 2d 28 (1975) in the court below, the majority seemed to be persuaded by the ON THE RECORD acknowledgement by Brogan that he stood advised by counsel.[1] Circuit Judge McCree[2] dissented holding that McCarthy v. United States, 354 U.S. 459, is mandatory; that "(t)here is no adequate substitute for demonstrating in the record at the time the plea is entered the defendant's understanding of the nature of the charge against him." (519 F. 2d at 30).

While the record in the instant case indicates that counsel was present and bargained with the Government (Pet. App. A-12) the record is absolutely devoid of anything that might reach the Brogan test, the Rule 11, (c) [advice to the defendant], (d) [insuring the plea is voluntary], (f) [determine the accuracy of plea], or (g) [record . . . without limitation, the COURT'S ADVICE TO THE DEFENDANT . . . .], (all emphasis ours). Inter alia, how can this record be urged as one which adequate(ly) complies with Rule 11, [Govt. Brief p. 4] when

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[1] 519 F. 2d at p. 29:

THE COURT: All right, Brogan, you have heard Mr. Fink, your attorney, advise the Court that he has discussed this matter with you?

BROGAN: Yes, sir.

THE COURT: Has he explained your rights to you?

BROGAN: Yes, sir.

* * *

And you thoroughly understand the charge in Count Two you are going to plead to?

BROGAN: Yes, sir, I do.

* * *

[2] Hon. Wade McCree, then Circuit Judge, now Solicitor General of the United States of America.

the record is silent as to whether Eckman had the advice and explanation of rights by his lawyer [Brogan, supra] or the COURT'S ADVICE [Rule 11 (g)]? We respectfully contend it is not and cannot be assumed to be even slight compliance with Rule 11 and when the Court below held, after review of the whole record, there was no violation of the new Rule 11, it came in conflict with the Second and Fourth Circuits in United States v. Journet, 544 F. 2d 633 and United States v. Boone, 543 F. 2d 1090. Moreover, it departed in substance from its own decision in Brogan, supra, and violated this Court's mandate in McCarthy, supra.

We opt for an extension of the McCarthy mandate — that Rule 11 proceedings be conducted with the same solemnity as a trial to court in federal criminal proceedings. Anything less than that makes a farce and mockery of this Court's mandate and the mandate by Congress. We urge that the Congressional mandate is the progeny of McCarthy-Boykin-Santobello.[3] It was the legislative response to a need signaled by this Court's reasoning in those cases. The need is manifest. See: Schraft, Petition for Cert., No. 76-1611, at p. 9.

Reliance upon the McCarthy-Boykin-Santobello cases teaches that doctrinaire presumption of regularity under Rule 11 proceedings no longer persuades where the RECORD is silent. We contend that when a plea bargain shows on the record without more, it was a coerced plea per se. Santobello (supra) dicta, is ample support for our conclusion that the plea bargain on the record does not excuse McCarthy, supra, compliance with Rule 11, because fundamental rights are at stake in State or Federal criminal proceedings. And when the accused goes to intentionally relinquish his fundamental rights, privileges and guarantees, it must be done in accord with accepted judicial and legislative safeguards. Rule 11, Fed. Rules of Crim Proc. (Dec. 1, 1975); McCarthy v. United States, supra; Boykin v. Alabama, supra; United States v. Journet, supra; United States v. Boone, supra; cf. Johnson v. Zerbst, 304 U.S. 458, 464, (1938).

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[3] McCarthy v. United States, 394 U.S. 459 (1969)
Boykin v. Alabama, 395 U.S. 238 (1969)
Santobello v. New York, 404 U.S. 257 (1971)

After we filed our petition, we found that the Fifth Circuit joined the Journet-Boone test by requiring literal compliance. United States v. Aldridge, 553 F. 2d 922 (5th Cir. 1977).

Hence, when Eckman's lawyer agreed with Government counsel (Pet. App. A-12) to a bargain, and the trial judge stated such to Eckman (Pet. App. A-14) to which he agreed, the post-judgment revocation of probation was the product of a broken bargain when something other than criminal activity was the peg for probation revocation. It is obvious that the inquiry raised at the threshold, a plea bargain situation. In the absence of a painstaking inquiry about that bargain (United States v. Aldridge, supra, 553 F. 2d at p. 923) it only served to demonstrate an impremissibly coerced plea.

Rule 11 (1975), is a method provided by Congress for specific proceedings other than trial on a criminal charge. One can no more expect that only a semblence of compliance appear on the record under the methodology provided than in a case where the Fifth Amendment or Fourteenth Amendment due process requirements are not manifest in the record.

The problems will not "disappear" as suggested by the Government (Govt. Brief at p. 7, Scharf, No. 76-1611) any more than problems disappeared within three years of the 1966 Rule. See United States v. Michaelson, 552 F. 2d 472, 476 (2 Cir. Mar. 31, 1977).[4] Whether Michaelson represents some sort of retreat from the same court's Journet decision seems to be expressly denied.

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[4] In addition to the Scharf case No. 76-1611, raised by the Government Brief, the following cases were filed in this Court raising a Rule 11 problem: Kearney v. United States, (CA 9) No. 76-1646; Riffe v. United States, (CA 5) No. 76-1748, But see: United States v. Aldridge, 553 F. 2d 922 (5th Cir. 1977); Hamilton v. United States, (CA 10) No. 76-1818).

If the Government's position [Govt. Brief, p. 5 n. 1] seems persuasive, and we strongly urge it is not, the petitioner will be put to an insurmountable burden below because the District Attorney for the Northern District of Ohio would argue that the Sixth Circuit had the last word on this record — the law of the case! They seek to foist an undue hardship on this particular petitioner since it is highly unusual for this Court to set-forth reasons for denial of review. Such a position, we respectfully claim, is untenable.

> Yet, we cannot ignore that the plea here was taken after the trial commenced and before Journet authoritatively construed the amendments to Rule 11, and in a context where Michaelson must have known his rights. Under these circumstances, we believe it would be a needless rigid construction of Rule 11 to hold that the guilty plea on this record must be set aside. Our decision therefore is not to be interpreted as overruling Journet in any respect, (522 F. 2d 477, 478).

While Michaelson sounds like a retreat from Journet, the Fifth Circuit took a firm stand under the new Rule 11, calling for literal compliance and a painstaking inquiry about any plea bargain. United States v. Aldridge, 553 F. 2d 922 (5th Cir. 1977).

Finally, the subject is ripe for review. It is not a malady that will disappear. Chief Judge Joseph S. Lord observed that pre-sentence data will not fill the gap in a Rule 11 record. United States v. Zampitella, 416 F. Supp. 604 (ED. Pa. 1976); neither will defendant's acknowledged possession of a copy of the indictment fill the knowledge-understanding gap in a Rule 11 record. See: United States v. Rex, 465 F. 2d 875; 876 (6th Cir. 1972).

The foregoing adds further justification for certiorari and review.

Respectfully submitted,

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